

***United States Court of Appeals
for the Second Circuit***



**PETITION FOR
REHEARING**

76-7541

United States Court of Appeals

FOR THE SECOND CIRCUIT

DANIEL E. RYAN, Admr. of the Estate of Marvin George Ellsworth Mousseau,
Plaintiff,

vs.

NEW BEDFORD CORDAGE COMPANY, REYNOLDS & SON, INC.,
VERMONT CONSTRUCTION COMPANY, INC., and
GEORGE & ASMUSSEN, LTD.,
Defendants,

VERMONT CONSTRUCTION COMPANY, INC.,

vs.

Plaintiff-Appellant,
JOHNSON INDUSTRIAL PAINTING CONTRACTORS, INC.,
Defendant.

Civil Action No. 73-240.

ALVIN E. MARTIN,

vs.

Plaintiff,
NEW BEDFORD CORDAGE COMPANY, REYNOLDS & SON, INC.,
VERMONT CONSTRUCTION COMPANY, INC., and
GEORGE & ASMUSSEN, LTD.,
Defendants,

VERMONT CONSTRUCTION COMPANY, INC.,

vs.

Plaintiff-Appellant,
JOHNSON INDUSTRIAL PAINTING CONTRACTORS, INC.,
Defendant.

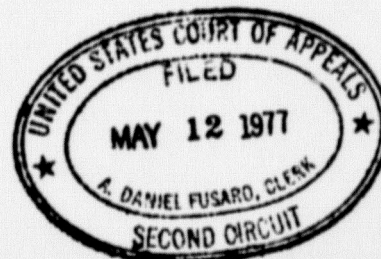
Civil Action No. 74-99.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF
VERMONT IN CIVIL ACTIONS No. 73-240 AND 74-99.

PETITION FOR RE-HEARING AND CLARIFICATION

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BATAVIA TIMES, APPELLATE COURT PRINTERS
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20 CENTER ST., BATAVIA, N. Y. 14020
716 848-0407



PETITION FOR RE-HEARING AND CLARIFICATION

Now comes the Defendant-Appellant, Vermont Construction Company, Inc., by and through its attorneys, Miller & Norton, and petitions the Court for re-hearing and clarification because the Court has overlooked or misapprehended the following points of law:

1. During oral argument, Judge Gurfein stated that the dismissal of the third-party complaint for failure to state a claim was not a decision on the merits and, therefore, did not bar a new suit by Vermont Construction against Johnson.

2. This is a misapprehension of Rule 41 (b) F.R.C.P. which makes the dismissal of the lower court "an adjudication on the merits". (Line 49)

3. Such a dismissal operates as res judicata and bars any subsequent action by Vermont Construction against Johnson.

Hall v. Tower Land & Inv. Co., C. A. 5th, 1975, 512 F. 2d 481; Rinehart v. Locke, C. A. 7th, 1971, 454 F. 2d 313.

Accordingly, it has been said:

"[A] dismissal for failure to state a cause of action is a final judgment on the merits sufficient to raise the defense of res judicata in a subsequent action between the parties."

Glick v. Ballentine Produce, Inc., C. A. 8th, 1968, 397 F. 2d 590, 592-593

4. In affirming on the opinions of Judge Holden, dated September 17, 1974 and September 30, 1976, this Court made no exception to that portion of those opinions holding that Vermont

Construction had no claim or cause of action against Johnson because of the rule against contribution among joint tortfeasors.

This is an incorporation by reference of a misapprehension of law contrary to the holding in Ryan Stevedoring Co. Inc. v. Pan-Atlantic SS. Corp., 350 US 124, 100 L ed 133, 76 S. Ct. 232 (1956).

If the Court intended that Vermont Construction not be precluded from instituting a separate, independent suit against Johnson, it must specifically exclude those portions of Judge Holden's opinion that dealt with dismissing the third-party complaint from incorporation by reference.

To fail to do otherwise would be to affirm the dismissal of the third-party complaint contrary to the holding in Ryan Stevedoring Co. Inc. v. Pan-Atlantic SS. Corp., Supra.

Unless this Court clarifies its opinion, the substantive rights of Vermont Construction to proceed against Johnson in a separate, independent suit will be barred by Rule 41 (b) and subject to the defense of res judicata.

Dated: May 9, 1977

MILLER & NORTON

By


Lawrence Miller

AFFIDAVIT OF SERVICE BY MAIL

State of Vermont)
County of Rutland) ss.:
City of Rutland)

Nos. 74-99, 73-240

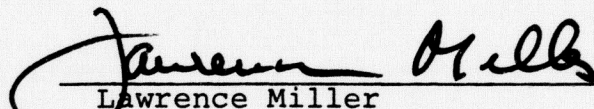
Re: Daniel E. Ryan, etc. et al
v.
New Bedford Cordage

I, Lawrence Miller, being duly sworn, say: I am over eighteen years of age and a partner in the law firm of Miller & Norton, Esquires.

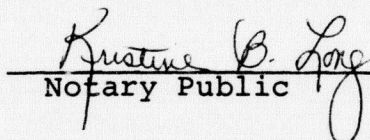
On the 9th day of May, 1977, I mailed copies of a printed Petition for Re-Hearing and Clarification in the above case, in a sealed, postpaid wrapper to:

20 copies to: A. Daniel Fusaro, Clerk, U. S. Court of Appeals, Second Circuit, New Federal Court House, Foley Square, New York, New York 10007
3 copies to: Tyler & Bruce, Esquires
120 North Main Street, St. Albans, Vt. 05478
3 copies to: O'Connell & Wolfe, Attn: Louis E. Wolfe, Esq.
66 Margaret Street, Plattsburg, N. Y. 12901
3 copies to: Dinse, Allen & Erdman, Esquires
186 College Street, Burlington, Vt. 05401
3 copies to: Pierson, Affolter & Amidon, Esquires
253 South Union Street, Burlington, Vt. 05401
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9 Prospect Street, St. Johnsbury, Vt. 05819

at the First Class Post Office in Rutland, Vermont. The package was mailed about 4:00 p.m. on said date.


Lawrence Miller

Sworn to before me this 9th day of May, 1977.


Notary Public